Supreme Court, U. S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1978

NO. 78-1622

SYLVESTER HIGHSAW, Petitioner,

v.

STATE OF INDIANA, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

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April 20, 1979

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. _____

SYLVESTER HIGHSAW, Petitioner

v.

STATE OF INDIANA, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

The petitioner, Sylvester Highsaw, by counsel, respectfully petitions this Court to issue a Writ of Certiorari to the Supreme Court of Indiana to review that Court's decision upholding the trial court's denial of the petitioner's motion to suppress evidence seized in violation of the Fourth and Fourteenth Amendments.

OPINION BELOW

The opinion of the Supreme Court of Indiana is reported, Highsaw v. State, ____ Ind. ____, 381 N.E.2d 470 (1978), and is attached hereto at A. 1.

JURISDICTION

The judgment of the Supreme Court of Indiana was entered on October 17, 1978, affirming petitioner's conviction dated April 6, 1977. The Supreme Court of Indiana denied petitioner's timely petition for rehearing on January 25, 1979.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3).

QUESTION PRESENTED FOR REVIEW

The question presented in this petition is whether the Fourth and Fourteenth Amendments require the suppression of evidence which is discovered by a police officer in the possession of the defendant during a stop of the defendant, in his automobile on a public street, where the search warrant for the person of the defendant clearly does not comply with the decisions of this Court and the officer had no other probable cause or reasonable suspicion for stopping the automobile of the defendant.

CONSTITUTIONAL PROVISONS INVOLVED

1. Fourth Amendment to the Constitution of the United States:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not

be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

2. Section One of the Fourteenth Amendment to the Constitution of the United States:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

On March 21, 1977, Officer Matthews of the Indianapolis Police Department obtained, from a Magistrate, two search warrants for two residences in Indianapolis. A.9. In his affidavits to the Magistrate, Officer Matthews stated that an unnamed informant had told him that these two residences were "under the control of Sylvester Highsaw." A.12 and 13. The Supreme Court of Indiana interpreted the warrants as being "to the effect that both Appellant's residence and the person of Appellant were to be searched." A.2.

On March 22, 1977, Officer Matthews observed Highsaw driving an automobile on the street near one of the two residences. A.24. Officer Matthews stopped the automobile for the purpose of executing one of the search warrants for the person of Sylvester Highsaw. A.25. Other than the search warrant, Officer Matthews had no probable cause to stop or search Sylvester Highsaw. A. 25-26. During the stop,

Officer Matthews discovered heroin in the possession of Sylvester Highsaw. A.27.

Prior to trial, petitioner's counsel moved to suppress the heroin and a hearing was held on the motion. A.8. At the conclusion of the hearing the trial court denied the motion to suppress. The trial court judge indicated that he believed the search warrant was invalid, but denied the motion to suppress because "you just have a right to stop a car." A.28-29.

The heroin was introduced into evidence at the trial over the objection of counsel for the petitioner. A.29-30. Petitioner was convicted, by a jury, of possession of heroin and sentenced to fifteen years imprisonment.

The Supreme Court of Indiana affirmed the conviction. The court held that the heroin was properly admitted into evidence, but for a reason different than that given by the trial court. The Supreme Court of Indiana held that "The warrants issued for the search of both the residences and Appellant personally in this case demonstrate that the police had probable cause to suspect Appellant of narcotics violations." A.3-4.

REASONS FOR GRANTING THE WRIT

Petitioner in this case was convicted for possessing heroin which was discovered by a police officer who had stopped petitioner in his automobile on a public street to execute two unquestionably invalid search warrants for the person of the petitioner.

The search warrants the officer was executing were so clearly invalid that the trial court judge did not rely on them in upholding the stop, (A.28-29), the prosecutor at trial did not rely on the warrants, (A.28), and when the case was before the Supreme Court of Indiana, the Indiana Attorney General did not defend the search warrants in his brief (Brief of Appellee at 4-6). No person has ever made an argument that the warrants comply with the requirements of Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964).

The trial court judge admitted the heroin into evidence because "you just have a right to stop a car." A.28-29. This rationale is, of course, contrary to the Fourth and Fourteenth Amendments. Delaware v. Prouse, ___ U.S. ___, ___ S.Ct. ___, ___ L.Ed.2d ___, 47 LW 4323 (1979).

In affirming petitioner's conviction, the Supreme Court of Indiana blatently refused to recognize the Fourth and Fourteenth Amendments and the decisions of the United States Supreme Court. It is of utmost importance to the people of the State of Indiana and to our constitutional system that this affront to the Constitution of the United States not be permitted to stand. The Supreme Court of Indiana has sanctioned a search warrant which does not even come close to satisfying constitutional standards and the court has given no explanation of this extraordinary decision. This petition for writ of certiorari will probably be the only federal judicial review of this obvious rejection, by the Supreme Court of Indiana, of the supremacy of the Constitution of the United States. Stone v. Powell, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976).

If this decision continues to be the law of the State of Indiana, all criminal courts in the state will have an open invitation to ignore the Fourth Amendment exclusionary rule. The exclusionary rule is unpopular with the Supreme Court of Indiana as it is with some of the members of this Court, but it is the law of the land and the highest court of the State of Indiana should not be permitted to ignore the exclusionary rule with impunity.

The decision could trigger a movement in other states to re-define Fourth Amendment guarantees. If Stone v. Powell, Id., is combined with a reluctance of this Court to issue writs of certiorari in cases where state courts blatently refuse to enforce the Fourth Amendment, state courts will be secure in rewriting the law of search and seizure. The constitutional consistency of which this Court has sought since Martin v.

Hunter's Lessee, 1 WHEAT 304, 4 L.Ed. 97 (1816), will be jeopardized.

The Supreme Court of Indiana disposed of the Fourth Amendment issue in one paragraph. The court said:

> "[W]hether a search and seizure is unreasonable within the meaning of the Fourth Amendment depends upon the facts and circumstances of each case. South Dakota v. Opperman, (1976) 428 U.S. 364, 372, 96 S.Ct. 3092, 3098-99, 49 L.Ed.2d 1000, 1007; Guardiola v. State, (1978) ___ Ind. ___, 375 N.E.2d 1105, 1110. The warrants issued for the search of both of the residences and appellant personally in this case demonstrate that the police had probable cause to suspect appellant of narcotics violations. Thus, when police observed and recognized appellant driving dow. the street, they were justified in stopping his automobile and searching him and arresting him after they found heroin during this search. Under all the facts and circumstances noted here, this search was reasonable under the Fourth Amendment of the United States Constitution. Appellant's Motion to Suppress the heroin was thus properly denied and there is no error on this issue." A.3-4.

It takes only a cursory examination of warrants (A.14 and 20) to recognize the warrants do not "demonstrate that the police had probable cause," at least as probable cause has been defined by this Court. Carroll v. U.S., 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925).

The Indiana courts have interpreted these two warrants as authorizing a search of 1) the described residences and 2) the person of Sylvester Highsaw. In his affidavits for the search warrants, the officer alleged the following facts:

1) Heroin was being kept, used and sold at the described residence;
2) The residences were under the control of Sylvester Highsaw;
3) Within 3 days prior to issuance of the warrant the officer's unnamed informant observed heroin being kept, sold and used in the residences;
4) The informant knew the substance he had observed to be heroin because of its appearance and its packaging, and because he had previously purchased and used heroin;
5) On at least two other occasions, information provided by the informant had made it possible for the officer to seize heroin.

A.11-13 and 18-20.

Petitioner has never challenged the validity of these search warrants as they applied to the two dwellings. However, as search warrants for the person of petitioner, which would justify stopping petitioner in his automobile on a public street, the warrants are patently invalid.

The only reference to the petitioner in the affidavits is the officer's allegation that the residences were under the "control" of petitioner.

The affidavits did not provide the Magistrate any underlying facts to support the informant's statement that the residences were "under the control of Sylvester Highsaw." An inclusion of underlying facts is required by Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964), and without the underlying facts the statement in the affidavit is merely "the informant's 'suspicion', 'belief' or 'mere conclusion.'" Id. at 378 U.S. 114. The Magistrate had no facts upon which he could make an independent determination as to whether Sylvester Highsaw was in control of the residences and he functioned only as a rubber stamp of the police officer. This process is clearly violative of the Fourth Amendment. See Nathanson v. United States, 290 U.S. 41, 54 S.Ct. 11,

78 L.Ed. 159 (1933); Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964); Spinelli v. United States, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969).

The conclusion of the informant that the residences were under the control of Sylvester Highsaw must be disregarded, and without that conclusion the petitioner Sylvester Highsaw is not named or otherwise referred to in the Affidavits. The failure of the affidavits to identity the person in control of the dwellings does not defeat the warrant as to the dwellings, but there is no basis whatsoever for a search warrant for the person of Sylvester Highsaw. Since the warrant for the search of the person of Sylvester Highsaw was constitutionally defective, the warrant could not provide a basis for Officer Matthews to stop Sylvester Highsaw in his automobile on a public street. Since the stop was impermissible the heroin which Officer Matthews discovered during the stop was seized in violation of the Fourth and Fourteenth Amendments and should have been suppressed.

Even if there had been a substantial basis upon which the Magistrate could have accepted the statement that the dwellings were under the control of Sylvester Highsaw, the facts in the affidavit do not establish probable cause for the issuance of a search warrant for the person of Sylvester Highsaw. The affidavits present no information indicating that the petitioner had ever had heroin in possession, that he had ever sold or used heroin, that the petitioner was present when the informant observed heroin in the residence, or that the petitioner even knew heroin was being kept, sold or used in the residences. See, Draper v. United States, 358 U.S. 307, 79 S.Ct. 329, 3 L.Ed.2d 327 (1959).

The only facts presented to the Magistrate were that heroin had on one occasion within three days before the warrant been kept, sold and used in the dwellings and that the dwellings were under the "control" of Sylvester Highsaw. These two facts taken alone, would not "warrant a man of reasonable caution in the belief", Carroll v. United States, 267 U.S. 132, 162, 45 S.Ct. 280, 69 L.Ed. 543 (1925), that

the petitioner had heroin concealed on his person. A comparison of the Affidavits for Search Warrant in this case (A.14 and 20) with that found to be constitutionally deficient in Spinelli, 393 U.S. at 420, dramatically demonstrates the inadequacy of the affidavits in the present case.

The facts known to Officer Matthews at the time he stopped Mr. Highsaw's automobile on the street do not even rise to the level of "reasonable suspicion" which might permit the officer to make an investigatory stop. Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). Since Officer Matthews was relying strictly upon the warrant when he stopped Mr. Highsaw, neither the trial court nor the Supreme Court of Indiana considered the Terry standard. However, Justice DeBruler, in his dissenting opinion, said "[m]oreover, there were no facts available to the officers as they stopped the car which would warrant a man of reasonable caution in the belief that such action was appropriate. [Citing Terry v. Ohio, Id.]" A.7.

A comparison of the facts of the present case with those of Sibron v. New York, 392 U.S. 40, 88 S.Ct. 1889, 20 L.Ed.2d 917 (1968), demonstrates the accuracy of Justice DeBruler's conclusion. In Sibron the police officer personally observed the defendant converse with six or eight known narcotics addicts during an eight-hour period and then meet, at a restaurant, with three more known addicts. By contrast, in the present case the only information Officer Matthews had was the hearsay statement of an informant that narcotics had been kept, used and sold on one occasion within the past four days (the petitioner's arrest being one day after the warrant was issued) at two particular residences which were under the control of Mr. Highsaw, and Officer Matthews' observation of Mr. Highsaw driving an automobile away from one of the residences on a public street.

A person of reasonable prudence would undoubtedly think Mr. Sibron was much more vulnerable to a stop and frisk than was Mr. Highsaw. Yet, this Court concluded that on "the

facts of Sibron's case, it is clear that the heroin was inadmissible in evidence against him", 392 U.S. at 62.

Furthermore, Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) and its progeny Adams v. Williams, 407 U.S. 143, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972), are inapplicable on their facts. In both of these cases the police officer had a reasonable suspicion, based on specific articulable facts, that the defendant was armed and dangerous and the safety of the police officer or others was in jeopardy. In the present case, Officer Matthews did not have any indication at all that Mr. Highsaw was armed or dangerous and Officer Matthews' stop of Mr. Highsaw was in no way related to the safety of Officer Matthews or anyone else.

Other than the patently invalid warrants, Officer Matthews had no articulable and reasonable suspicion that Mr. Highsaw was subject to seizure for violation of law and therefore the stop is not even supported by the dicta in Delaware v. Prouse, 47 LW 4323, 4327. The stop was in every respect contrary to the Fourth Amendment and the heroin which Officer Matthews discovered during the stop should have been suppressed.

The Supreme Court of Indiana has cavalierly ignored the Fourth and Fourteenth Amendments in this case. It is imperative that this Court not permit such an obvious rejection of the Constitution of the United States. "If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy." Olmstead v. United States, 277 U.S. 438, 485, 48 S.Ct. 564, 72 L.Ed. 944 (1928) (Brandeis, J. Dissenting).

CONCLUSIONS

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Supreme Court of Indiana.

Respectfully Submitted,

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ATTORNEYS FOR PETITIONER

April 20, 1979

IN THE

SUPREME COURT OF INDIANA

SYLVESTER HIGHSAW, Appellant,	)	
vs.	)	NO. 977 S 660
STATE OF INDIANA Appellee.	)	

APPEAL FROM MARION CRIMINAL COURT, DIVISION III

The Honorable Andrew Jacobs, Sr., Judge

PIVARNIK, J.

At the conclusion of a jury trial on April 6, 1977, in Marion Criminal Court, appellant Highsaw was convicted of two counts of possession of a controlled substance to-wit: Heroin. He was sentenced to a term of fifteen years imprisonment with a concurrent sentence of five years imprisonment.

Two errors are asserted in this appeal: (1) whether the trial court erred in overruling appellant's Motion to Suppress evidence seized from his person, and; (2 whether

or not the trial court erred in not allowing appellant a continuance when certain changes in the charges against appellant were made

I.

Appellant first challenges the constitutionality of the search of his person which resulted in the seizure of heroin. The facts relevant to this issue are as follows: On March 21, 1977, the Indianapolis Police obtained two search warrants for two Indianapolis residences. On of these two residences was alleged to be under the control of Sylvester Highsaw, appellant herein. The police affidavit alleged that a confidential, credible and reliable informant saw heroin used and sold at appellant's residence. The search warrant issued was to the effect that both appellant's residences and the person of appellant were to be searched. On March 22, 1977, Indianapolis police officers approached one of the residences named in the search warrant and observed appellant Highsaw proceeding down the street in his

automobile. The officers recognized appellant from previously having seen a picture of him. The officers then stopped the automobile in which appellant was riding, approached appellant, identified themselves, and then saw appellant lower his hand which was made into a fist. A police officer told appellant to keep his hand where it was and open it up. When appellant opened his hand, the police observed a tinfoil packet which was found to contain heroin.

Whether a search and seizure is unreasonable within the meaning of the Fourth Amendment depends upon the facts and circumstances of each case. South Dakota v. Opperman, (1976) 428 U.S. 364, 372, 96 S.Ct. 3092, 3098-99, 49 L.Ed.2d 1000, 1007; Guardiola v. State, (1978) ____ Ind. ____, 375 N.E.2d 1105, 1110. The warrants issued for the search of both the residences and appellant personally in this case demonstrate that the police had probable cause to suspect appellant of narcotics viola-

tions. Thus, when police observed and recognized appellant driving down the street, they were justified in stopping his automobile and searching him, and arresting his after they found heroin during this search. Under all the facts and circumstances noted here, this search was reasonable under the Fourth Amendment of the United States Constitution. Appellant's Motion to Suppress the heroin was thus properly denied and there is no error on this issue.

II.

Appellant's second contention of error is that the trial court denied him due process and a fair trial when it denied his request for a continuance based on an alleged material change in the charging information. This alleged error is based on the fact that on the day of appellant's trial, the prosecutor moved to make certain amendments to the second count upon which appellant was charged. The date on which the offense was supposed to have been committed was changed along with a change in factual allega-

tion to the effect that instead of possessing over ten grams of heroin. Appellant, at this time, made an oral motion for continuance. Appellant did not discuss the necessity, purpose, or proposed duration of this requested continuance, and the court overruled said motion.

Pursuant to Ind. Code § 35-3.1-1-5 (Burns 1975), a prosecutor may at any time amend an indictment or information, as long as the defendant is accorded an adequate opportunity to prepare his defense commensurate to such changes. In the present case, at the time the trial court allowed the amendment, appellant did not allege how his substantial rights were going to be prejudiced by these amendments. Further, no such prejudice is obvious to us from the rather technical changes here alleged. Appellant, for instance, did not have an alibi defense which would have been affected by the date change, and we fail to see how he was prejudiced by the change concerning the number of grams of heroin which he possessed. Thus,

no manifest abuse of discretion in the court's granting of these amendments has been demonstrated. See Henderson v. State, (1977) ____ Ind. App. ____, 364 N.E.2d 175, 176-77; Lemont v. State, (1976) ____ Ind. App. ____ 344 N.E.2d 88, 89-90, trans. denied, (1977) ____ Ind. ____, 359 N.E.2d 251. There is thus no error here.

The judgment of the trial court is affirmed.

GIVAN, D.J., HUNTER, PRETICE, JJ. CONCUR.

DeBRULER, J. DISSENTS WITH OPINION

IN THE

SUPREME COURT OF INDIANA

SYLVESTER HIGHSAW	)	
	)	
Appellant,	)	
	)	
vs.	)	No. 977 S 660
	)	
STATE OF INDIANA,	)	
	)	
Appellee.	)	

APPEAL FROM MARION CRIMINAL COURT, DIVISION III
Honorable Andrew Jacobs, Sr., Judge

DeBRULER, J. - Dissenting

The crux of this case is whether the stop was lawful. The two warrants authorized the police to search Sylvester Highsaw in conjunction with a search of the premises and did not authorize them to stop and search him for drugs wherever he might be found. There was no probable cause to arrest him or to search the car. Moreover, there were no facts available to the officers as they stopped the car which would warrant a man of reasonable caution in the belief that such action was appropriate.

Terry v. Ohio, (1968) 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889. The State has not sustained its burden of demonstrating that the intrusion upon the appellant was justified, and therefore the heroin should have been suppressed.

PORTIONS OF THE

TRANSCRIPT OF HEARING

ON DEFENDANT'S MOTION TO QUASH

TR 122 L 21 THROUGH TR 129 L 22

DIRECT EXAMINATION

QUESTIONS BY MR. ITTENBACH:

Q. Would you state your name for the record please?

A. Norman Matthews.

Q. Where are you employed sir?

A. Indianapolis Police Department, assigned to the narcotics branch.

Q. And how long have you been assigned to the narcotics branch?

A. Approximately 2 1/2 years.

Q. And were you assigned to the case of Sylvester Highsaw?

A. Yes I was.

Q. Did you secure a search warrant on or about March 21, 1977?

A. I did.

Q. Did you, in fact, secure two search warrants at that time?

A. Yes I did.

Q. And did you secure a search warrant for the premises at 3326 North Ruckle Avenue?

A. I did.

Q. And also the premises of 4123 North Carrollton Avenue?

A. That is correct

Q. Now when you went to get those search warrants, what court did you go to?

A. I went to -- I can't recall the number of the court but it was Municipal Court Judge Patrick Barton.

Q. Officer Matthews, I will hand you for

purpose of identification only as Defendant's Exhibit A in two parts, which is 3326 North Ruckle. Can you identify that?

A. Yes.

Q. And what is that sir?

A. That is the Affidavit and a copy of the Search Warrant that I had with me the date of March 21st.

Q. And this is for the search of the premises of 3326 North Ruckle Avenue?

A. Yes it is.

Q. That is Defendant's A in two parts.

A. That is correct.

Q. Now I will hand you Defendant's Exhibit B in two parts and ask you if you can identify that, just yes or no.

A. Yes I can

Q. And is it the Search Warrant that you obtained on March 21, 1977?

A. Yes it is.

Q. And it is for the residence of 4123 North

Carrollton Avenue?

A. Yes it is.

Q. Now these are photostatic copies. Are they exact duplicates of the originals that you prepared, other than the clerk's certificate on it.

A. Yes.

Mr. Ittenbach: I would offer Defendant's Exhibits A and B into evidence.

Mr. Pylitt: No objection.

Court: Defendant's Exhibits A and B are admitted without objection.

DEFENDANT'S EXHIBIT A, HAVING BEEN OFFERED AND ADMITTED INTO EVIDENCE, WITHOUT OBJECTION, IS IN THE FOLLOWING WORDS AND FIGURES:

AFFIDAVIT

STATE OF INDIANA, COUNTY OF MARION, SS:

N.W. Matthews Police Officer swears or affirms that he believes and as good cause to believe that a controlled Substance to wit; Heroin a derivative of Opium the possession of which is

unlawful is being kept, used and sold at 3326 North Ruckle Av. Indianapolis, Marion County, Indiana and that said residence is under the control of Sylvester Highsaw N/M AKA "Satan" and N/F name unknown to me. This Affiant bases his belief on the fact that he received information from a confidential, credible and reliable informant that he/she was personally in the residence at 3326 North Ruckle Av. Indianapolis, Marion County, Indiana within the last three (3) days prior to 3-21-77 and personally observed a substance known to him/her to be Heroin a derivative of Opium being kept, used and sold at the above mentioned address. The Informant is reliable in the fact that previous information given to me by said Informant has resulted in at least two (2) arrests and seizures of Heroin a derivative of Opium and other controlled substances. The Informant knows it to be Heroin a derivative of Opium by its appearance and by the way it is packaged since in the past said informant has purchased and used Heroin a deriv-

ative of Opium. I am requesting this Search Warrant so that this Affiant may lawfully search the residence at 3326 North Ruckle Av. Indianapolis, Marion County, Indiana which is located on the west side of Ruckle Av. 3300 North being Black/Gray in color, 2-story w/basement search to include living room, kitchen, roon used as Den, bedrooms and bathroom. I request this search to include all rooms, closets, cabinets, storage areas, personnal containers and basement or any evidence of a conspiracy to violate the Indiana Controlled Substance Act and for the persons of Sylvester Highsaw N/M AKA "Satan" and N/F name unknown to me, and anyplace where Heroin a derivative of Opium maybe kept or concealed.

/S/ N.W. Matthews

Subscribed and sworn to before me this 21st day of March, 1977.

/S/ Patrick J. Barton

Judge of Municipal Court of Marion County

SEARCH WARRANT

STATE OF INDIANA, COUNTY OF MARION, SS:

To the Superintendent and Any Member of the Police Force of the City of Indianapolis, Greeting:

WHEREAS, there has been filed with me an affidavit, of which the following is a copy, to-wit:

STATE OF INDIANA, COUNTY OF MARION, SS:

N.W. Matthews Police Officer City of Indianapolis swears that a Controlled Substance to wit; Heroin a derivative of Opium the possession of which is unlawful is being kept, used and sold at 3326 North Ruckle Av. Indianapolis, Marion County, Indiana and that said residence is under the control of Sylvester Highsaw N/M AKA "Satan" and N/F name unknown to me. This Affiant bases his belief on the fact that he received information from a confidential, credible and reliable informant that he/she was personally in the residence at 3326 North Ruckle Av. Indianapolis, Marion County, Indiana within the

last three (3) days prior to 3-21-77 and personally observed a substance known to him/her to be Heroin a derivative of Opium being kept, used and sold at the above mentioned address. The Informant is reliable in the fact that privious information given to me by said Informant has resulted in at least two (2) arrests and seizures of Heroin a derivative of Opium and other Controlled Substances. The Informant knows it to be Heroin a derivative of Opium by its appearance and by the way it is packaged since in the past said Informant has purchased and used Heroin a derivative of Opium. I am requesting this Search Warrant so that this Affiant may lawfully search the residence at 3326 North Ruckle Av. Indianapolis, Marion County, Indiana which is located on the west side of Ruckle Av. 3300 North being Black/Gray in color, 2-story w/basement search to include living room, kitchen, room used at Den, bedrooms and bathroom. I request this search to include all rooms, closets, cabinets, storage areas, per-

sonnal containers and basement or any evidence of a conspiracy to violate the Indiana Controlled Substance Act and for the persons of Sylvester Highsaw N/M AKA "Satan" and N/F name unknown to me, and anyplace where Heroin a derivative of Opium maybe kept or concealed.

/S/ N.W. Matthews

Subscribed and sworn to before me this 21st day of March, 1977.

/S/ Patrick J. Barton

Judge of Municipal Court of Marion County.

And the Court having examined said affidavit and being fully advised in the premises, now finds there is probable cause for the issuance of this search warrant.

YOU ARE,THEREFORE, COMMANDED, in the name of the State of Indiana, with the necessary and proper assistance, in the day time or in the night time, to enter into the premises described in said affidavit and there diligently search for the said Heroin a derivative of Opium and anyother Controlled Substances. aforesaid, and that you

bring the same or any part thereof found on such search, forthwith before me, at my office, to be disposed of according to law.

Given under my hand and seal of the court this 21st day of March, 1977.

/S/ Patrick J. Barton

Judge of Municipal Court of Marion County.

DEFENDANT'S EXHIBIT B, HAVING BEEN OFFERED AND ADMITTED INTO EVIDENCE, WITHOUT OBJECTION, IS IN THE FOLLOWING WORDS AND FIGURES, TO-WIT:

AFFIDAVIT

STATE OF INDIANA, COUNTY OF MARION, SS:

N.W. Matthews Police Officer swears or affirms that he believes and has good cause to believe that a Controlled Substance to wit Heroin, a derivative of Opium the possession of which is unlawful is being kept, used and sold at 4123 North Carrollton Av. Indianapolis, Marion County, Indiana and that said residence is under the control of Sylvester Highsaw N/M AKA "Satan". This Affiant bases his belief on the fact that he received information from a confidential, credible and reliable Informant that he/she was personally in the residence at 4123 North Carrollton Av. Indianapolis, Marion County, Indiana within the last three (3) days prior to 3-21-77 and personally in the residence observed a substance known to him/her to be Heroin a derivative of Opium being kept, used and sold at the above mentioned address. The Informant is reliable in the fact that previous information given to me by said Informant has resulted in at least two

(2) arrests and seizures of Heroin a derivative of Opium and other Controlled Substances. The Informant knows it to be Heroin a derivative of Opium by its appearance and by the way it is packaged since in the past said Informant has purchased and used Heroin a derivative of Opium. I am requesting this Search Warrant so that this Affiant may lawfully search the residence at 4123 North Carrollton Av. Indianapolis, Marion County, Indiana which is located on the East side of the 4100 block of Carrollton Av. being 2-story brown w/white trim having wire fensed yard and porch being red in color w/basement and second floor being an attic, house consisting of kitchen, dining room, living room, Den, bedrooms and bathroom. I request this search to include all rooms, closets, cabinets, storage areas, personnal containers or anyplace where Heroin a derivative of Opium or any evidence of a conspiracy to violate the Indiana Controlled Substance Act and for the person of Sylvester Highsaw N/M AKA "Satan".

/S/ N.W. Matthews

Subscribed and sworn to before me, this 21st day of March, 1977.

/S/ Patrick J. Barton

Judge of Municipal Court of Marion County.

SEARCH WARRANT

STATE OF INDIANA, COUNTY OF MARION, SS:

To the Superintendent and Any Member of the Police Force of the City of Indianapolis, Greeting:

WHEREAS, there has been filed with me an affidavit, of which the following is a copy, to-wit:

STATE OF INDIANA, COUNTY OF MARION, SS:

N.W. Matthews Police Officer City of Indianapolis swears That a Controlled Substance to wit Heroin, a derivative of Opium the possession of which is unlawful is being kept, used and sold at 4123 North Carrollton Av. Indianapolis, Marion County, Indiana and that said residence is under the control of Sylvester Highsaw N/M AKA "Satan". This Affiant bases his belief on

the fact that he received information from a confidential, credible and reliable Informant that he/she was personally in the residence at 4123 North Carrollton Av. Indianapolis, Marion County, Indiana within the last three (3) days prior to 3-21-77 and personally in the residence observed a substance known to him/her to be Heroin a derivative of Opium being kept, used and sold at the above mentioned address. The Informant is reliable in the fact that previous information given to me by said Informant has resulted in at least two (2) arrests and seizures of Heroin a derivative of Opium and other Controlled Substances. The Informance knows it to be Heroin a derivative of Opium by its appearance and by the way it is packaged since in the past said Informant has purchased and used Heroin a derivative of Opium. I am requesting this Search Warrant so that this Affiant may lawfully search the residence at 4123 North Carrollton Av. Indianapolis, Marion County, Indiana which is located on the East side of the

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/S/ N.W. Matthews

Subscribed and sworn to before me this 21st day of March, 1977.

/S/ Patrick J. Barton

Judge of Municipal Court of Marion County.

And the Court having examined said affidavit and being fully advised in the premises, now finds there is probable cause for the issuance of this warrant.

YOU ARE THEREFORE, COMMANDED, in the name of the State of Indiana, with the necessary and proper assistance, in the day time or in the night time, to enter into the premises described in said affidavit and there diligently search for the said Heroin a derivative of Opium and any other Controlled Substances.

aforesaid, and that you bring the same or any part thereof found on such search, forthwith before me, at my office, to be disposed of according to law.

Given under my hand and seal of the court this 21st day of March, 1977.

/S/ Patrick J. Barton

Judge of Municipal Court of Marion County.

Q. Now officer, on March 21, 1977 did you come into contact with one Sylvester Highsaw?

A. No I did not.

Q. O.k, did you come into contact with Sylvester Highsaw on March 22nd?

A. Yes I did.

Q. And where did you come into contact with Mr. Highsaw?

A. Approximately in the 4000 block of North Carrollton.

Q. Is it a fact that he was in a car at that time?

A. Yes he was.

Q. Where was he proceeding -- what direction, if the car was moving at all?

A. He was proceeding south on Carrollton.

Q. Was he breaking any traffic violations when you first saw him?

A. No he was not.

Q. Did you stop his automobile?

A. Yes we did.

Q. And when you stopped his automobile what was the first thing you said to him, if you said anything?

A. That we were police officers with a search warrant for his address and his person.

Q. Alright, that is the main reason you stopped him, is it not officer, that you had a search warrant?

A. Yes it is.

Q. O.k, you didn't see him committing any felonies in your presence?

A. No he did not.

Q. Did you see him committing any misdemeanors?

A. No he did not.

Q. O.k, you had no probable cause other than your search warrant, would that be a fair statement, for stopping him?

A. Yes sir.

Q. Now when you stopped him, and you told him that you had a search warrant for his person, did you, in fact, search his person?

A. Not at that time, no.

Q. Did you retrieve something from his person?

A. Yes I did.

Q. And is that what resulted in this charge?

A. That is correct.

Q. And you retrieved this by a search did you not?

A. No I did not.

Q. Well how was it retrieved sir?

A. At the time Mr. Highsaw was stopped, he had his hand sort of balled up in his fist like this. I told Mr. Highsaw I was a police officer with a search warrant for his person and his residence, at which time Mr. Highsaw started lowering this hand that he had clenched. I told him to keep the hand just where it was and to open it.

Q. O.k, so you did search his hand by making him open his hand, right?

Mr. Pylitt: Judge, I will object to the term "search". It is a legal term. He can ask the officer what he did.

Court: Yes, just describe what you did.

Q. You made him open his hand, is that correct?

A. I asked him to open his hand, which he did.

Q. And then is this where the substance was that you seized?

A. Yes it was.

Q. And this is the substance with which you have charged him with?

A. That is correct.

Q. Now until he opened his hand -- well I'm sorry, he opened his hand at your command, is that correct, and that is when you saw whatever it was you seized?

A. Correct.

Mr. Ittenbach: I have no further questions.

TR 136 L 6-7

Mr. Ittenbach: Your Honor, at this time we would move to suppress the evidence.

TR 146 L 17-26

Court: Is there any other grounds -- well first of all, let me get the State's position. Do you contend that this search, whatever it was, whether it be a search or otherwise, was pursuant to the search warrant?

Mr. Pylitt: No Your Honor. It is our position that the officers were there under the authority of that search warrant.

TR 155 L 4-6

Court: Now you are not contending that the search was made pursuant to the search warrant?

Mr. Pylitt: No Your Honor.

TR 163 L 1-7

Mr. Ittenbach: Your Honor, what was the basis

for the stop of the car in the first place, in the court's opinion?

Court: Well according to this decision of Judge Prentise you just have a right to stop a car. There is a statute to that effect. Have you read that Mr. Ittenbach?

PORTION OF THE
TRANSCRIPT OF THE TRIAL
OF SYLVESTER HIGHSAW,
APRIL 6, 1977.
TR 239 L 7 THROUGH TR 240 L 5

Mr. Pylitt: At this time the State would offer what as been marked as State's exhibit number, 1, and contents.

Mr. Ittenbach: I suppose I'll have several objections, Your Honor. One for reasons previously stated, two,

I don't think the proper chain of custody has been established, three, the chemist has now testified there were other substances contained in State's exhibit, 1, that are not heroin. I don't suppose you can separate them; I suppose the chemist could, but I can't; for those reasons I'll object.

Court: The objection will be overruled. Exhibit 1, will be admitted into evidence, over objection.